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No. 12091.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ESTATE OF EDWIN W. RICKENBERG,

Deceased.

LORAINE T. RICKENBERG, Executrix,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

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Jurisdictional Statement.

Loraine T. Rickenberg, executrix of the Estate of Edwin W. Rickenberg, Deceased, your petitioner, seeks the re-determination of a deficiency in federal estate tax determined by the respondent. The decedent, a resident of Pomona, California, died August 23, 1944. Your petitioner is the duly appointed, qualified, and acting executrix of his estate, and duly filed with the Collector of Internal Revenue for the Sixth Collection District of California a federal estate tax return for the estate, and paid the tax reported thereon in the amount of $32,150.00. On May 3, 1946, within the time prescribed by Sec. 874, and under the authority of Sec. 871(a) of the Internal Revenue Code, the respondent sent a Notice of Deficiency in respect of estate tax to your petitioner. Your petitioner duly filed with the Tax Court of the United States a petition for a re-determination of the deficiency. Jurisdiction of the proceeding is conferred upon The Tax Court of the United States by Sec. 871(a) and Sec. 1101 of the Internal Revenue Code. The decision of The Tax Court was entered September 22, 1948. Jurisdiction for review of said decision in this Court is founded upon Secs. 1141 and 1142 of the Internal Revenue Code. The pleadings necessary to show the existence of jurisdiction are the petition [R. 3] and answer thereto [R. 12]. From the decision of The Tax Court [R. 44] determining a deficiency in estate tax in the amount of $39,588.81, your petitioner has filed her Petition for Review by this Court [R. 45].

Statutes and Regulations Relied Upon.

This case arose under certain amendments made to the Internal Revenue Code by the Revenue Act of 1942. Provisions taxing community interests in the same manner as joint interests were added to the Code for estate tax, and a provision taxing gifts of community property was also added to the Code for gift tax purposes. The provisions for estate tax of community interests are contained in Sec. 402 of the Revenue Act of 1942, whereby Secs. 811(d)(5) and 811(e)(2) were added to the Code. Sec. 453 of the Revenue Act of 1942 added Sec. 1000(d) to the Code providing for a gift tax on community property. These amendments affecting community property were in force and effect during the period in which the decedent died as a resident of a community property state, California. Secs. 811(d)(5) and 811(e)(2) were specifically repealed by Sec. 351 of the Revenue Act of 1948, effective with respect to estates of decedents dying after December 31, 1947. Sec. 1000(d) of the Code was amended by Sec. 371 of the Revenue Act of 1948, to be applicable only to gifts made after the calendar year 1942 and on or before the date of the enactment of the Revenue Act of 1948. The date of enactment was April 2, 1948.

The provisions of the Internal Revenue Code controlling in the premises are Sec. 811(a), (c), (d)(5), and (i), and are set out in the appendix hereto, as are the related gift tax provisions and applicable Treasury regulation.

Statement of the Case and Questions Involved.

This case involves the correctness of the deficiency in respect of the federal estate tax liability of the estate of the decedent determined by the respondent and affirmed by The Tax Court. The basis of the determination by the respondent is that the decedent and his surviving spouse, prior to December 2, 1942, owned their property in joint tenancy, and on that day the title to the properties was transferred to decedent and his wife as tenants in common, and that the transfer by the decedent of his joint-held property of a value of $124,560.94 was includible in the gross estate under the provisions of Secs. 811(c) and 811(d)(5) of the Internal Revenue Code. The alleged transfer was the result of an agreement entered into on December 2, 1942, between decedent and his surviving spouse whereby it was declared that the property which they held in joint tenancy was community property and henceforth would be owned by them as tenants in common.

The facts are set forth in the opinion of The Tax Court [R. 15-28].

Petitioner duly filed federal estate tax return for decedent's estate and included therein one-half of the real estate of an agreed total value of $70,700.00; one-half of the 1675 shares of common stock of the J. C. Penney Co. of an agreed total value of $177,712.00 owned by decedent and his wife at the date of his death; but included all the 40 shares of capital stock of the Home Builders' Loan Association of Pomona, California, of an agreed value of $9,000.00; all of certain United States Treasury bonds of an agreed value of $6,397.13; and all the bank account in the amount of $23,988.66 and two automobiles in the respective agreed values of $1,415.00 and $1,280.00; but omitted the household furniture in an agreed value of $1,500.00. Life insurance in the agreed value of $53,703.84 was also included in the return.

The household furniture in the total value of $1,500.00 was included in the gross estate by the respondent. Seven hundred fifty dollars of the amount was included as the value of decedent's one-half share. The remaining $750.00 was included in decedent's gross estate, together with one-half of the agreed values of the real estate and the 1675 shares of stock of the J. C. Penney Co. under the provisions of Secs. 811(c) and 811(d)(5) of the Internal Revenue Code.

The respondent determined that the real property and shares of stock and the household furniture were owned by the decedent and his wife as joint tenants, and that in December, 1942, the title to those properties was transferred to decedent and his wife as tenants in common.

Certain other minor adjustments were made to the gross estate by the respondent, but these were waived at the hearing before The Tax Court.

Petitioner duly filed with The Tax Court of the United States a petition placing in issue:

(a) The determination of the Commissioner that the value of one-half of the real property and the 1675 shares of stock of the J. C. Penney Co. owned by the decedent prior to December 2, 1942, was includible in his gross estate as a transfer made in contemplation of death;

(b) That the value of the household furniture was erroneously determined to be $1,500.00;

(c) That the Commissioner erroneously failed to determine that a piano was the separate property of decedent's spouse;

(d) That the Commissioner had erroneously failed to determine that only one-half of the value of the life insurance policies should be included in the gross estate since the entire value had been included in the estate tax return;

(e) That the Commissioner had erroneously failed to determine that decedent owned only an undivided one-half interest in the property held by himself and his wife at the date of his death.

In the petition an overpayment was claimed because of the erroneous inclusion of the full value of the life insurance policies and the erroneous inclusion of the full value of certain of the properties owned by decedent and his surviving spouse in tenancy in common at the time of his death.

At the hearing the following issues were waived:

(b) The value of the household furniture;

(c) The piano;

(d) The value of the life insurance policies.

The trial was had upon the issue of the inclusion in the gross estate of the full value of the real property and 1675 shares of stock of the J. C. Penney Co. and the claimed overpayment resulting from the erroneous inclusion in the gross estate by the petitioner of the full value of the 40 shares of capital stock of the Home Builders' Loan Association of Pomona, California, the United States Treasury bonds, the bank account, and the two automobiles, and because of deductions allowable in computing the net estate arising from expenses incurred in the prosecution of the appeal, which were then undetermined.

The Tax Court after the hearing entered its finding of fact and opinion sustaining the respondent, but provided in the opinion that petitioner incurred certain expenses in connection with the administration of the estate and the appeal which were not determinable, and that effect should be accordingly given in the determination of the amount of the deficiency.

Following the entry of the opinion, respondent filed a computation of the estate tax and the deficiency due, in which your petitioner acquiesced, subject to right of appeal, which computation reduced the deficiency to the sum of $39,588.81. On September 22, 1948, The Tax

Court entered its decision determining a deficiency in accordance with this computation [R. 44]. From this decision petitioner filed her Petition for Review by this court [R. 45-53].

The questions involved in this review are:

1. Whether the property owned by decedent and his wife prior to the agreement of December 2, 1942, was held in joint tenancy or in community?

This question is raised by the holding of The Tax Court that said property was held in community, contrary to the contention of the petitioner and the determination of the respondent in the deficiency notice, and raised for the first time at the hearing by respondent.

2. Whether a transfer of an interest in property was made by decedent by the agreement of December 2, 1942, irrespective of ownership in joint tenancy or property held as community property?

This question is the necessary first step in the basic inquiry, and The Tax Court assumed the affirmative. No new issue is presented, but the legal concept of the word "transfer" as used in the statute must be established before the statute can apply.

3. Whether Sec. 811(c) was made applicable by Sec. 811(d)(5) of the Internal Revenue Code to divisions of community property between spouses upon death of one, or did it apply only to transfers by the spouses to a third party or parties? This question is inherent in the interpretation of Sec. 811(d)(5). The statutory language re-

fers only to transfers by decedent and surviving spouse. The respondent in his regulations included a division between spouses as being within the statute. The Tax Court agreed. Petitioner contends the regulation is invalid in this respect.

4. Whether a transfer by decedent to his wife of his interest in property held in joint tenancy with her which in law is not subject to testamentary disposition, was within the statute?

This question arises through the failure of The Tax Court to hold that decedent and his surviving spouse held their property in joint tenancy.

5. Whether the decedent entered into the agreement of December 2, 1942, for the primary and dominant purpose of escaping estate taxes?

This question of fact arises from The Tax Court's holding such was the motive.

6. Whether a primary and dominant purpose to escape estate taxes as a matter of law constitutes the agreement of December 2, 1942, a transfer of an interest in property made by decedent "in contemplation of or intended to take effect in possession or enjoyment at or after his death" within the meaning of Sec. 811(c) of the Internal Revenue Code?

This question of law arises through the erroneous holding of The Tax Court that such a motive was alone sufficient to bring the agreement within the statute. *Denniston v. Commissioner* (C. C. A. 3, 1939), 106 F. 2d

925, on the precise point is *contra.* In *Allen v. Trust Company of Georgia* (1946), 326 U. S. 630, the Supreme Court refused to decide it is. The Tax Court, in the latest decision on the point in *Estate of Charles J. Rosebault, Laura D. Rosebault, Executrix,* January 5, 1949, 12 T. C. No. 1, held exactly opposite.

7A. Whether by the agreement of December 2, 1942, a *bona fide* sale for an adequate and full consideration in money or moneys worth took place between decedent and his wife within the exception provided in Sec. 811(c) of the Internal Revenue Code?

7B. If a *bona fide* sale did not take place, whether there existed any excess in value of the property transferred by decedent over the property received in exchange under the limitation provisions of Sec. 811(i) of the Code?

The Tax Court held no sale occurred and there was not consideration as contemplated by the statute. It, however, held there existed an exchange of property interests, and Sec. 811(i) limits the inclusion in gross estate under Sec. 811(c) to the excess of the value of the interest transferred over the value of the interest received, if a *bona fide* sale did not exist but an exchange occurred.

8. Whether petitioner overpaid the estate tax?

This question is raised by the erroneous inclusion in the gross estate of decedent of property not owned by him at the time of his death. The case should be remanded for determination of the amount of overpayment.

Specification of Errors Relied Upon.

1. The Tax Court erred in holding that the decedent and his surviving spouse held their property as community property prior to the agreement of December 2, 1942. Said holding is contrary to the evidence, which establishes that the property was held in joint tenancy with rights of survivorship, and the respondent so determined in his notice of deficiency.

2. The Court erred in holding and deciding that interests in property were transferred by the decedent to his wife by the agreement of December 2, 1942. The agreement did not cause a transfer of the one-half of the property owned by each. Each party owned precisely the same property after the agreement as before. The change in legal title occurred irrespective of conveyances, and is recognized for federal tax purposes.

3. The Tax Court erred in failing to hold that Sec. 811(c) of the Code did not apply to a division of community-held property between spouses. Sec. 811(d)(5) plainly provides that it is applicable only to gifts by both spouses to a third party or parties. The respondent invalidly attempted by his regulations to extend the statute to such a division.

4. The Tax Court erred in failing to hold and decide that the transfer by decedent to his wife of his interest in property held in joint tenancy with her was not within the purview of the statute. An estate in joint tenancy cannot be devised by a joint tenant. It vests in the survivor at death of the joint tenant. A transfer of a share of the joint estate by a co-tenant could not be a substitute for a testamentary disposition—hence not within the purview of the statute.

5. The Tax Court erred in holding and deciding that the primary and dominant motive of the decedent in making the agreement of December 2, 1942, was to escape estate taxes. The holding is contrary to the evidence which establishes that the primary motive of the decedent, if any, was to divide the ownership of their property as the parties had always understood and intended their property ownership to be, and to assure a division of income for income tax purposes and to avoid a possible gift tax which decedent had been advised would be imposed if the division was made after January 1, 1943. The evidence establishes that decedent acted without original motive. He acted entirely upon the advice and insistent urging of counsel, who advised him that execution of the agreement would not be subject to estate tax; therefore, decedent could not possibly have had an intent to avoid estate tax.

6. The Tax Court erred in holding and deciding that a primary and dominant purpose to escape estate taxes was alone sufficient to constitute the agreement of December 2, 1942, a transfer of interests in property made by decedent in contemplation of, or intended to take effect in possession or enjoyment at or after, his death within the meaning of Sec. 811(c) of the Internal Revenue Code. This is an error of law. The Supreme Court, the Circuit Court of Appeals for the Third Circuit, and The Tax Court itself in a later decision, all have held specifically that such a motive alone is not sufficient to bring a transfer within the statute.

7A The Tax Court erred in holding and deciding that the agreement of December 2, 1942, between decedent and his wife did not constitute a bona fide sale for an adequate and full consideration in money or money's worth within the exception provided in Sec. 811(c) of the Internal Revenue Code. This is an erroneous conclusion of law in that, under the law, any transmutation of community property between spouses is an exchange of like properties for like properties, which constitutes adequate and full consideration in money or money's worth, and, by the nature of the exchange, a bona fide sale exists.

7B. The Tax Court erred in failing to hold and decide that if a transfer occurred by the agreement of December 2, 1942, there resulted an exchange of property of equal value so that there was no excess of the fair market value at the time of the death of the property otherwise to be included on account of such transaction over the value of the consideration received therefor by the decedent as provided in Sec. 811(i) of the Internal Revenue Code.

8. The Tax Court erred in failing to hold and decide that petitioner overpaid the estate tax. A decision favorable to the petitioner would result in an overpayment of estate tax by virtue of the erroneous inclusion in the return filed for the estate of property not belonging to decedent at the time of his death, and, also, by virtue of additional court costs and attorneys' fees incurred by petitioner in the prosecution of this appeal. A decision favorable to the petitioner would require the remanding of the case for the purpose of ascertaining the amount of the overpayment.

Summary of Argument.

The argument of petitioner may be summarized as follows:

1. The respondent in his deficiency notice found that the property of the decedent and his surviving spouse was owned by them in joint tenancy prior to December 2, 1942, and that after that date, pursuant to an agreement dividing the property between the parties, they held their properties in tenancy in common, and that the value of the property transferred by the decedent was includible in the gross estate under Sec. 811(c) and (d)(5) of the Internal Revenue Code. Sec. 811(d)(5) pertains solely to transfers of property held as community property. The Tax Court held that the property of the decedent and his surviving spouse were held as community property prior to December 2, 1942. Petitioner accommodated her proof to the determination contained in the deficiency notice that the property was owned in joint tenancy, and the evidence submitted on behalf of the respondent, and admissions made at the trial by respondent, support petitioner's contention on this point. The Tax Court erred in holding that the property was held as community property. The respondent did not properly raise the question of community ownership, having failed to amend his answer or apprise the petitioner prior to the hearing that such was his contention, which was contrary to his determination. The Tax Court should have passed the point.

2. A transfer of interest in property was not accomplished, the agreement of December 2, 1942, dividing the

property held by decedent and his surviving spouse whether in joint tenancy or as community property. Such a change in ownership could occur upon oral agreement. There merely is a declaration of change in ownership, and no possible transfer of interests in property could occur, since each party owned the identical interests in property before the agreement as after. Hence the requirements of the statute, that a transfer of interests in property must have occurred, has not been met, and Sec. 811(c) of the Internal Revenue Code is not applicable in the premises.

3. Sec. 811(c) was not made applicable to a division of community property between spouses by Sec. 811(d)(5) of the Code. The plain wording of that section makes it applicable only to gifts by the spouses to a third party or parties. The respondent's regulations attempt to extend the section to be applicable to a division of property between spouses. It is beyond the scope of the statute, and, therefore, invalid.

4. A transfer of a share of an estate held in joint tenancy could not constitute a transfer of interest in property made in contemplation of, or intended to take effect in possession or enjoyment at or after, the death of a decedent because such a share of a joint estate, by the very essence of the estate, could not be disposed of by will and hence could not be a substitute for a testamentary disposition. The crux of the application of Sec. 811(c) to transfers of interests in property is that the interest so transferred is subject to testamentary disposition since upon the death of the co-tenant the survivor, by operation of law. receives the full estate. The statute does not apply.

5. The evidence does not support the finding and holding by The Tax Court that the primary and dominant motive of the decedent in making the agreement of December 2, 1942, was for the purpose of escaping estate taxes. The evidence proves beyond question that the decedent acted entirely at the insistence of and upon the advice of counsel to such an extent that there was a want of a motive. The evidence is clear that decedent thought he and his wife owned their property in separate estates, share and share alike, and that holding their property in joint tenancy accomplished this result. Their intention had been to so hold their property, and when decedent became apprised of the fact that a joint tenancy did not mean separate ownership, he executed the agreement of December 2, 1942, to divide his property to accomplish this purpose. The agreement was made entirely upon advice of counsel that such would not be within the federal estate tax laws and that it would serve to assure a division of income which decedent was interested in preserving for income tax purposes, since he contemplated retirement from business on July 1, 1943, and was apprehensive that the federal income tax laws would be changed to eliminate the division of income enjoyed by community property states. Finally the agreement was entered into upon advice of counsel that it should be done prior to January 1, 1943, in order to escape a federal gift tax which would become effective on that date upon a division of community-held property.

The evidence proves that it was a physical impossibility for the decedent to have had any motive to escape estate tax, let alone a primary and dominant motive. Counsel, advising decedent to make the agreement, assured him that no estate taxes would be affected by the agreement if made prior to January 1, 1943. In this regard respondent's regulations extending the statute to include transfers between spouses of community property were not promulgated until March 10, 1943, so that as far as decedent knew or could have intended, he did not make the agreement on December 2, 1942, for the purpose of escaping estate taxes.

6. The Tax Court committed an error of law by holding that a primary and dominant motive to escape estate taxes alone is sufficient to bring a transfer of interest in property by the decedent within the purview of Sec. 811(c) of the Internal Revenue Code. The case of *Denniston v. Commissioner* (C. C. A. 3, 1939), 106 F. 2d 925, held on that precise point that such a motive, standing alone, is not sufficient to bring a transfer within the purview of the statute. In the case of *Allen v. Trust Company of Georgia* (1946), 326 U. S. 630, the Supreme Court refused to hold that such a motive was sufficient to bring the transfer within the statute. In the case of *Estate of Charles J. Rosebault,* 12 T. C.—No. 1, decided by The Tax Court on January 5, 1949, it was specifically held that such a motive will not alone cause the transfer to be in contemplation of death.

None of the cases relied upon by The Tax Court supports its holding. There were other factors and elements present in each of the cases relied upon which justified those decisions.

The holding of The Tax Court is in direct conflict with the *Denniston* case and the doctrine of the *Trust Company of Georgia* case and its own latest decision on the point.

7A. If a transfer occurred by the agreement of December 2, 1942, then a bona fide sale for an adequate and full consideration in money or money's worth took place within the meaning of the exception provided in Sec. 811(c) of the Internal Revenue Code, and The Tax Court erred in including in the gross estate of the decedent said property. There is authority for the proposition that a bona fide sale occurred by the exchange of properties between decedent and his surviving spouse. All other factors necessary to bring the transaction within the exception provided in the statute are present. That there was adequate and full consideration is so patent that it needs no argument. The Commissioner found that the value of the transferred interest in property was $124,560.94, and under The Tax Court's theory of the case the decedent received the same value of property, so it is inconceivable that any holding could ever be made such as The Tax Court did, that $124,560.94 exchanged for $124,560.94 did not constitute adequate and full consideration for the transfer. Further, The Tax Court's theory that decedent's wife was exchanging her marital rights in the community-held property is utterly absurd and without foundation and is in direct conflict with the holding in the case of *United States v. Goodyear* (C. C. A. 9, 1938), 99 F. 2d 523 and *United States v. Malcolm* (1931), 282 U. S. 792, and *Commissioner v. Harmon* (1944), 323 U. S. 760, wherein it was held that the wife had full ownership of her half of the community-held property.

7B. If the agreement of December 2, 1942, constituted a transfer of interest in property by the decedent and such was not a bona fide sale for an adeqaute and full consideration in money or money's worth, then petitioner reported at least the value of the interest in all property owned by decedent at the time of his death because such value did not exceed the value of the interest transferred by him for the consideration of the property owned by his wife. Sec. 811(i) is a limiting section of the Code upon transfers occurring under Sec. 811(c), and the factor of contemplation of death becomes, as a result, of no importance in the determination of the value to be included in the gross estate. In fact, Sec. 811(i) presumes that there was a transfer made in contemplation of death; yet it specifically provides that if the transfer was made for consideration only the excess of the value of the property transferred by the decedent at the date of his death over the value of the property received as consideration in the transaction is includible in the gross estate. Here again an exchange of property of the value of $124,560.94 for property of the value of $124,560.94 certainly is consideration, and there is no excess to be included in the gross estate of the decedent.

8. Petitioner overpaid the estate tax on behalf of the Estate by erroneously including in the gross estate of the decedent the full value of the shares of stock of the Home Builders' Loan Association of Pomona, California, United States Treasury bonds, and two automobiles and the joint-held bank account. This error, coupled with additional expenses incurred in the prosecution of this appeal for attorneys' fees, court costs, and costs of appeal, requires that the case be remanded to The Tax Court with instructions to enter a decision of the amount of the overpayment of estate tax made.

ARGUMENT.

POINT I.

The Property of the Decedent and His Wife Prior to the Execution of the Agreement of December 2, 1942, Was Held in Joint Tenancy With Rights of Survivorship, and Not in Community.

A. Ownership in Joint Tenancy Is Proved by the Evidence.

The evidence clearly establishes that the property of the decedent and his wife was held in joint tenancy at the time they executed the agreement of December 2, 1942. It was agreed at the hearing that the deeds to the four parcels of real property [R. 66, 67] were in joint tenancy in the names of the decedent and his wife with rights of survivorship. It was further agreed at the hearing that the certificate of ownership of the 1675 shares of common stock of the J. C. Penney Co. [R. 67] involved in the proceeding stood in the individual name of Edwin W. Rickenberg. The testimony of Mr. A. L. Hickson, the attorney for Mr. Rickenberg, establishes that the 40 shares of capital stock of the Home Builders' Loan Association of Pomona, California, also stood in the individual name of the decedent [R. 163, 164]. The testimony of Mrs. Rickenberg establishes without contradiction that all the certificates of stock, the government bonds, and certificates of title to the two automobiles were kept in a safety deposit box owned in the joint names of the decedent and his wife [R. 142].

The evidence also establishes without contradiction that the banking account in the amount of $23,980.66 was a joint banking account of decedent and wife [R. 142].

The recitations of the agreement itself do not negate the fact that the decedent and his wife owned their property in joint tenancy prior to December 2, 1942. There is adequate explanation for the paragraph of the agreement which reads:

> "Whereas they have accumulated and acquired certain property since their said marriage, all of which property has been and is up to this time community property, * * *."

This paragraph was placed in the agreement as the result of the discussions which decedent had with one Walter W. Jones relative to his retirement from business. Although resident of a community property state for nearly all his life, decedent took title to his real properties in joint tenancy. When questioned by Jones as to the manner in which his property was held, he stated that he held the properties in joint tenancy. Jones did not remember the manner in which decedent said he owned his personal property.

It could have been that the personal properties were held as community property so far as Jones knew. He was advising decedent in the matter, hoping to sell insurance policies on the life of the decedent as well as on the life of his wife, and undertook to aid the decedent in straightening out the title to his properties [R. 108, 109].

After written advice relative to the tax effect was obtained by Jones from a tax counsel, one Toll, Jones suggested that the decedent execute an agreement with his wife stating that their property was community property, the title to which had been held as joint tenants and would thereafter be held by them as tenants in common, each an undivided one-half interest therein, which suggestion became incorporated in the agreement of December 2, 1942, involved herein [R. 203, 206].

The declaration in the agreement that the property was community property was thus the result of the advice of the said Jones. It does not comport with the facts which are established by the evidence that the decedent and his surviving spouse owned their property in joint tenancy. The decedent by his statements narrated by Jones supported the contention that the property was owned in joint tenancy [R. 107, 108], as did the testimony of Mrs. Rickenberg [R. 141, 142].

It is thus apparent that the actual ownership of the property by decedent and his wife prior to December 2, 1942, was in joint tenancy. The recitations of the agreement that it was owned as community property is not supported by any evidence, but is a mere statement which was incorporated in the agreement at the suggestion and advice of decedent's counsel, and hence can have no effect to establish ownership.

The respondent himself in the deficiency notice made a determination that the properties "were held by the decedent and his wife as joint tenants and that in December, 1942, the title to these properties was transferred to decedent and his wife as tenants in common." This is the part of the official determination which gave rise to the instant proceeding [R. 8, 11].

The preponderant weight of the evidence shows joint tenancy. Such method of ownership was determined by the respondent in his notice of deficiency. The Tax Court not only committed error in holding that the decedent and his surviving spouse held their property as community property prior to the agreement of December 2, 1942, but went far afield in order to arrive at such a conclusion.

B. The Tax Court Should Have Passed the Question of Ownership of the Property of Decedent and His Surviving Spouse Prior to the Execution of the Agreement of December 2, 1942, and Accepted Respondent's Determination in His Notice of Deficiency That Said Properties "Were Owned by the Decedent and His Wife as Joint Tenants."

In his notice of deficiency the respondent made the determination that "transfers of property of the value of $124,560.94 are included in the gross estate under the provisions of Sec. 811(c) and 811(c)(5) of the Internal Revenue Code." The next paragraph of respondent's determination states:

> "The evidence shows that the four items of real property described in Schedule A of the return, the 1675 shares of stock of J. C. Penney Co. described in Item 1 of Schedule B, and the household furniture of the total value of $1,500.00 were owned by the decedent and his wife as joint tenants and that in December, 1942, the title to these properties was transferred to decedent and his wife as tenants in common * * *."

Thus we have an official determination by the Commission that the decedent and his surviving spouse, prior to the execution of the agreement of December 2, 1942, owned their properties as joint tenants. The respondent gives as his reason for including the value of the properties in the gross estate of the decedent that the transaction created a transfer under the provisions of Secs. 811(c) and 811(d)(5) of the Internal Revenue Code.

Without having amended his pleadings to raise the issue that the property was held as community property by decedent and his surviving spouse prior to the agreement of

December 2, 1942, and without having made any offer of amendment of the pleadings prior to the hearing before The Tax Court, the respondent at the hearing, speaking through his counsel, attempted to change his own determination that the property was owned in joint tenancy and to contend that the properties involved were owned by decedent and his surviving spouse as community property prior to the agreement. The respondent at the trial abandoned his determination that the transfers of joint-held property were includible in the gross estate under the provisions of 811(c) [R. 62].

The court's attention is respectfully directed to the fact that respondent at the hearing and in his brief filed with The Tax Court made no contention that the properties were held in joint tenancy and were, therefore, includible in the gross estate of the decedent under the provisions of Sec. 811(c).

Sec. 811(d) by its very wording refers only to properties held as community property by decedent and his surviving spouse, and it brings into play Sec. 811(c) and the transfers enumerated under Sec. 811(d) (1), (2), (3), and (4) only where there has been a transfer of property held as community property by decedent and his surviving spouse during their marital lives.

It is demonstrated by respondent's own inconsistent contention with his determination that Sec. 811(c) of the Code was not even considered by respondent to be applicable to a transfer by decedent of property held by him in the estate of joint tenancy with his surviving spouse. Respondent shifted his position at the trial and on brief to attempt to justify his determination on an entirely different ground; to-wit, that the properties were held as community properties.

That the respondent may not make a determination on one ground and then without timely amendment of his answer prior to trial where issue has been joined upon the determination change his ground for the assertion of the deficiency and raise a new issue which the taxpayer is not prepared to answer and of which he has no knowledge until confronted at the hearing, is well established as a rule of law for a protection of the fundamental rights of a taxpayer. As the Supreme Court said in *General Utilities and Operating Co. v. Helvering* (1935), 296 U. S. 200:

> "Always a taxpayer is entitled to know with fair certainty the basis of the claim against him; stipulations concerning facts and any other evidence properly are accommodated to issues adequately raised."

Petitioner in the hearing before The Tax Court prepared her case and accommodated her evidence to the issue thus adequately raised by the above quotation from the deficiency notice, and there being no issue raised by the respondent prior to the hearing that decedent's property was held as community property, no evidence was offered by petitioner on this point, although if the notice of deficiency or an amended answer by respondent had raised the issue of community ownership, the contrary could easily have been proved.

Booth Fisheries v. Commissioner (C. C. A. 7, 1936), 84 F. 2d 49;

United Business Corp. of America, 19 B. T. A. 809;

Eric H. Heckett (1947), 8 T. C. 841;

The Maltine Co. (1945), 5 T. C. 1265;

Wentworth Mfg. Co. (1946), 6 T. C. 1201.

So in the instant case the petitioner was entitled to rely upon respondent's own determination that the property in question was held in joint tenancy prior to the agreement of December 2, 1942, and The Tax Court should have passed the point. But, in any event, the evidence which was adduced at the hearing and the stipulations of counsel as to the manner in which titles to the property were held, clearly establish that the property, prior to December 2, 1942, was by decedent and his surviving spouse in the estate of joint tenancy. This being so, and the respondent having made no argument that Sec. 811(c) was applicable to property held in joint tenancy, it must follow *a fortiori* that The Tax Court committed error in holding that the agreement of December 2, 1942, constituted a transfer of interest in property made by the decedent in contemplation of, or intended to take effect in possession or enjoyment, at or after his death within the meaning of that section.

The official determination was that the decedent owned his property in joint tenancy. Petitioner agrees that that was the fact, and raised no issue as to that determination. At the hearing respondent, through counsel, stated that his contention was that the decedent held his property as community property. Even if the law were otherwise permitting the shifting of grounds at trial, the respondent failed in his proof. (*Estate of Natalie Koussevitsky* (1945), 5 T. C. 650.) Respondent made no offer of proof of his contention that the property was held as community property. In addition to the error committed by The Tax Court in considering the new issue improperly raised, there just plain was not any evidence submitted by respondent to support the holding of The Tax Court. And, since no contention was made that a transfer of joint-held property was within the statute, the determination must be reversed.

POINT II.

No Interest in Property Was Transferred by the Decedent to His Wife by the Agreement of December 2, 1942, Within the Meaning of Sec. 811(c) of the Internal Revenue Code.

Whether the decedent and surviving spouse held their property as community property or in joint tenancy, the first inquiry is whether a transfer of any interest in property was made by the decedent by the agreement of December 2, 1942.

If there were not a transfer, obviously the statute does not apply. Thus it is said in *"Hughes, Federal Death Tax," 1938 Ed., Sec. 88:*

> "What the law taxes in contemplation of death is a 'transfer'. It follows that unless there is a transfer, this phrase has no application. A renunciation of a right under a will has been held not to give rise to a transfer."

and *1 Paul "Federal Estate and Gift Taxation," Sec. 6.04:*

> "It is also implicit in the statute that the decedent must have made a transfer and a transfer must have been of property owned by the decedent."

and, also, the following statements is made in *Montgomery's "Federal Taxes—Estate Trust and Gifts 1947-48," page 437:*

> "* * * Obviously the decedent must have transferred property during his life in order for the statute to be invoked."

In the case of *Brown v. Ruotzahn* (C. C. A. 6, 1933), 63 F. 2d 914, rev. *idem.* 58 F. 2d 239, cert. den. 290 U. S. 641, 54 S. Ct. 60, a surviving husband renounced a one-third interest in his wife's estate which she had bequeathed to him by her will. The Government sought to tax the renunciation under a section of the internal revenue laws which was a forerunner of Sec. 811(c) of the Code in question and contained the same wording in all important respects. The Circuit Court of Appeals for the Sixth Circuit, however, held that renunciation was not within the purview of the statute because the mere refusal of a decedent to take under a will was not a transfer. Similarly, the exercise or release of a power of appointment created by a third person was held not to be a taxable transfer under the analogous wording of the Gift Tax Law, Sec. 1000(a), which also required a "transfer."

> *Clark* (1942) 47 B. T. A. 865 (acq. by Commissioner 1942—2 C. B. 4);
>
> *Grasselli* (1946), 7 T. C. 257 (acq. by Commissioner 1946—2 C. B. 2).

In the majority opinion The Tax Court assumed that there were transfers of property by the decedent brought about by the agreement of December 2, 1942. There is evidence that instruments of conveyance were exchanged by the parties pursuant to said agreement. However, because of the determination of the respondent that the property was held in joint tenancy, and the agreements of counsel at the hearing, as discussed under Point I, these deeds and certificates of stock ownership were not placed in evidence. However, under the law of taxation and the property law of the State of California, these deeds and instruments of conveyance were completely superfluous and accomplished nothing in so far as any transfer of property occurred. Whether the property was held by the decedent and surviving spouse in joint tenancy or as community property, an agreement to change the ownership thereof to that of tenancy in common effected the change without there being any actual transfer of property involved, and such agreements of change of ownership of property are valid even though oral.

> *Jurs v. Commissioner* (C. C. A. 9, 1947), 147 F. 2d 805;
>
> *Estate of Lester L. Fletcher* (1941), 44 B. T. A. 429;
>
> *Estate of Joe Crial* (1942), 46 B. T. A. 658;
>
> *Samuel Friedman, et al.* (1948), 10 T. C. 1145.

What, then, was the effect of the agreement of December 2, 1942? It brought about merely a rearrangement of legal incidents of property ownership from the estate of joint tenancy or community property to that of tenants in common. Each of the parties had identical ownership and enjoyment of possession of his one-half of the property under the agreement as he had before.

Under the property laws of California, property held in joint tenancy by husband and wife is owned one-half by the husband and one-half by the wife. *Siberell v. Siberell* (1932), 214 Cal. 767; *Reiss v. Reiss* (1941), 45 Cal. App. 2d 740. In fact, this division of interest of ownership has been recognized by the respondent for income tax purposes, as demonstrated by his rulings that one-half of the income arising from property held in joint tenancy by husband and wife is taxable to the husband, and the other half, to the wife.

> *I. T. 3754, 1945, Cum. Bul. 143* and
>
> *I. T. 3825, 1946-2, Cum. Bul. 51.*

The separate ownership of one-half of the property held as community property by husband and wife by each is of course so well established that no citation of authorities need be given. It was because of this division of absolute ownership that the very sections of the statute involved in this case were enacted by Congress.

> *H. R. Rep. No. 2333, 1st Sess., 77th Congress, 1942-2, C. B. 489.*

There is perhaps no more fundamental doctrine in the law of taxation than the doctrine that "Taxation * * * is eminently practical, * * *," as stated by the Supreme Court in *Tyler v. United States* (1930), 281 U. S. 497, 74 L. Ed. 991, and reiterated by the Supreme Court in innumerable decisions to the effect that realities in tax matters should control and the incidents of taxation depend upon the substance.

> *Helvering v. Hallock* (1940), 309 U. S. 106, 60 S. Ct. 44, 84 L. Ed. 604, and
>
> *Gregory v. Helvering* (1935), 293 U. S. 465, 55 S. Ct. 66, 79 L. Ed. 596.

In the *Hallock* case, *supra,* the Supreme Court placed the lower courts and bar upon notice that the provisions of the Estate Tax Law were to be applied practically and that the "niceties of the art of conveyancing" will not be allowed to defeat the statute. The rule, if sound, should apply both ways. The "niceties of the art of conveyancing" should not be required to invoke the statute.

In the instant case The Tax Court by its holding gives approval to a purely ephemeral transfer of property derived from the medieval concepts as to the necessity of continuous seisin. The holding disregards entirely the actuality that no transfer of property took place in a practical or economic sense as to ownership, possession, or enjoyment. Had there been only an oral agreement, by what possible concept could a transfer of property have taken place? The same is true in the case of a written agreement. Any concepts of transfer under the circumstances of this case are indeed purely figmentary and illusory. No transfer could possibly exist in reality. This being so, the requirements of the statute have not been met, and Sec. 811(c), being predicated upon the transfer of interest in property which did not exist in this case, is not applicable, and the holding of The Tax Court that it is must be reversed.

In the case of the *Estate of Lester L. Fletcher, supra,* the Board of Tax Appeals held that a partition between husband and wife of property held in joint tenancy did not constitute a transfer.

A partition of property between parties is not a transfer in any sense of the word.

20 Cal. Jur., Partition, Sec. 66, pp. 653-654.

If The Tax Court be correct in its holding that the property of the decedent and his surviving spouse was held as community property prior to December 2, 1942, then it is all the more certain that no interest in property was transferred by the agreement by merely a change in form of ownership, transmutation, commutation, or division of legal ownership. Before the agreement was entered into, and after the agreement was entered into, each of the parties owned precisely the same undivided one-half interest in the entire property. Both Judge Hill and Judge Johnson in their dissenting opinions state that this is so. Further, Judge Johnson correctly points out in his opinion, page 42 of the record, that under California law the husband could not alienate the interest of the wife in the community without her consent, as provided by Secs. 161a, 172, and 172a of the Civil Code of California. Likewise, under the law of California the wife could not alienate the husband's interest, nor could she destroy the community state by making a transfer of her own individual interests.

Since neither party had the right under the law of California to make a transfer of his or her interest in the community property, it would follow that the agreement of December 2, 1942, could not cause or bring about in any way a transfer of an interest in property held as community property by the decedent and his surviving spouse. Since a transfer did not and could not occur, the basic premise assumed by The Tax Court does not exist, and the conclusion that a transfer of an interest in property was made by the decedent in contemplation of death is without support, and must be reversed.

POINT III.

Sec. 811(c) Was Not Made Applicable to a Division of Property Held as Community Property Between a Decedent and Surviving Spouse by Sec. 811(d) (5) of the Internal Revenue Code, but Was Only Applicable to Transfers of Community Property by Either or Both Spouses to a Third Party or Third Parties.

It is submitted that there exists a basic error underlying the determination of the respondent and the affirmation of that determination by The Tax Court. This error consists of a misinterpretation of the statutes involved and an invalid extension of the statute by the respondent in his regulations. Sec. 811(d)(5) as added to the Code by Sec. 402 of the Revenue Act of 1942 provides as follows:

> "For the purposes of this subsection and subsection (c), a transfer of property held as community property by the decedent and surviving spouse * * * shall be considered to have been made by the decedent, * * *."

Sec. 1000(d) of the Code as added by Sec. 453 of said Act provided:

> "All gifts of property held as community property * * * shall be considered to be the gifts of the husband. * * *"

The plain and obvious meaning of both sections is that transfers of property held as community property to third parties were to be in the case of death included in the gross estate of the first to die of the community, and in the case of gifts taxable to the husband. There is not one word in either section which indicates an intention on the part of Congress to tax to the husband divisions of community property by the husband and wife to themselves in some other form of legal ownership or to include in the estate of the first to die the entire value of the property held in community where a division of the community property had been made by the husband and wife into some other legal holding. The respondent, however, promulgated his regulations in respect of these additions to the Code on March 10, 1943, and as to estate tax provided in Regulations 105, Sec. 81.15, as amended by Treasury Decision 5239, the following:

> "In the case of estates of decedents dying after October 21, 1942, a transfer to a third party or third parties of property held as community property by the decedent and spouse * * *, shall be considered in accordance with Sec. 811(d)(5), as added by Sec. 402(a) of the Revenue Act of 1942, * * * to have been made by the decedent. * * * The same statutory provisions apply in the case of a division of such community property between the decedent and spouse into separate property, and in the case of a transfer of any part of the community property into sepaarte property of such spouse; in such cases, the value of the property which becomes the separate property of such spouse * * * shall be included in the gross estate of the decedent under Sec. 811(c) or Sec. 811(d), if the other conditions of taxability under such conditions exist."

In respondent's regulations 108, Sec. 86.2, as amended by Treasury Decisions 5366, May 5, 1944; 5437, February 3, 1945; 5471, August 14, 1945; and 5524, July 2, 1946, there was provided in respect of gifts of community property as follows:

> "(c)—During the calendar year 1943 and any calendar year thereafter any gift of property held as

> community property * * * constitutes a gift of the husband for the purpose of the gift tax statute (regardless of whether under the terms of the transfer the husband alone or the wife alone is designated as the donor or whether both are so designated as donors), * * *
>
> "The rule stated in the preceding paragraph applies alike to a transfer by way of gift of community property to a third party or third parties, to a division of such community property by the husband and wife into the separate property of each, and to a transfer by the husband and wife of any part of such community property into the separate property either of the husband or the wife or into a joint estate or tenancy by the entirety of both spouses. * * *"

The respondent thus by his regulations has extended the meaning of the sections of the statute to include divisions of community-held property between husband and wife. Such attempted extension of the provisions of the statute goes beyond the authority and power of the Commissioner to act, and therefore his regulations are invalid. Hence the partition of the property by decedent and his surviving spouse is not within the ban of the statute. *Estate of Carl Jandorf, The First National Bank of Boston, Custodian and Statutory Executor, v. Commissioner* (C. C. A. 2), 1948 P. H. par. 72, 662. There is nothing in the cases of *Beavers v. Commissioner* (C. C. A. 5, 1947), 165 F. 2d 208, cert. den. 68 S. Ct. 1018, and *Charles I. Francis* (1947), 8 T. C. 822, which directs a contrary conclusion. In both of these cases the gifts involved were made to third parties; in fact, those cases tend to bear out the contention here made and to demonstrate the fundamental error of the Commissioner, the respondent, and The Tax Court.

This conclusion is fortified by the fact that Congress did not make the gift tax amendment effective at the same time that the estate tax amendment became effective upon the enactment of the statute. A delay was provided from the date of the enactment, October 21, 1942, to January 1, 1943. The only logical explanation for this difference in time is that Congress wished to permit the citizens of the community property states to transfer their holdings into whatever form they desired without incurring any tax liability. It certainly seems logical that if Congress intended to include for tax purposes partitions or divisions of community-held property into other legal holding by the husband and wife, as the respondent has attempted to do by his regulations, it would hardly have provided for different effective dates of the two sections of the statute.

In any event, by use of the conjunctive expression "in both sections" it was the plain intent of Congress to include for tax purposes transfers of community-held property to a third party or third parties by husband and wife because, for reasons fully discussed herein, Sec. 811(i) and Sec. 1002 both limit the inclusion for tax purposes upon an exchange of properties the value to the excess of that transferred over that which was received in exchange therefor, which, obviously, in the case of divisions of community property would be zero. Therefore, Secs. 811(i) and 1002 of the Code not having been amended by Congress, any attempt on the part of the respondent to tax a division of community-held property was indeed futile.

For these reasons and the other reasons set forth in the various points discussed hereinbefore, the decision of The Tax Court should be reversed and the case remanded for a determination of the amount of the overpayment of estate tax made by petitioner.

POINT IV.

The Interest Which the Decedent Owned in the Property Held by Himself and His Surviving Spouse in Joint Tenancy Prior to the Execution of the Agreement of December 2, 1942, Could Not Be Disposed of by Him by Will, and Hence Could Not Be a Substitute for a Testamentary Disposition, and Therefore Was Not an Interest in Property of Which a Transfer Was Made by Him in Contemplation of His Death Within the Meaning of Sec. 811(c) of the Internal Revenue Code.

In deciding the key case interpreting the phrase "in contemplation of death" in a statute which was the forerunner of Sec. 811(c) of the Code, the Supreme Court, in *United States v. Wells* (1930), 283 U. S. 102, laid it down:

> "* * * The dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the tax * * *."

Since the key to the requirements of the statute is that the transfer itself must have been made as a substitute for a testamentary disposition, it must follow that acquisitions of interests in property by operation of law cannot result from substitutes for testamentary dispositions by a decedent, and therefore could not come within the purview of the statute.

As has been previously discussed, the very essence of an estate in joint tenancy is that upon the death of a joint tenant the estate by operation of law vests in the survivor. Hence a joint tenant cannot dispose of his share of the etsate by will. Since interests in property which cannot be disposed of by will and are transferred during life are the only interests and transfers Sec. 811(c) is concerned with, it follows that Sec. 811(c) is not applicable to a transfer of a share of a joint tenancy.

This was the essence of the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of the *Estate of Flick v. Commissioner* (C. C. A. 5, 1948), 166 F. 2d 733. In that case, under the law of the State of Florida the proceeds of insurance policies on the life of decedent conveyed by him to a trustee for the benefit of his wife and daughter were payable to the widow and daughter of the insured, the primary beneficiaries named in the trust, even though the policies were made payable to "executors, administrators, or assigns" of the insured. This being so, and the widow and daughter acquiring the property by operation of law, the Circuit Court of Appeals held that the gift of the policies in trust was not made in contemplation of death, and reversed the holding of The Tax Court to that effect. In its opinion the Circuit Court of Appeals made the following statement, which is dispositive of the instant case:

> "By what process of reasoning can it be truly said that A is indulging in a substitute for a testamentary disposition when he makes an irrevocable gift to B now of that which the law would have given B in

fuller measure if A by inaction had merely allowed the gift to become complete after his death."

So it is in the instant case if a transfer occurred of decedent's joint interest in the property on December 2, 1942, to his surviving spouse, it was merely giving his wife at that time that which the law would have given her in fuller measure if decedent by inaction had merely allowed the gift to be complete after his death. Hence the transfer could not be a substitute for a testamentary disposition, and therefore not within the purview of Sec. 811(c) of the Code.

The holding of The Tax Court in the case of *Estate of Frank K. Sullivan, supra,* to the contrary is obviously erroneous and directly in conflict with the principles enunciated in the *Flick* case, *supra,* although decided by The Tax Court before the *Flick* decision.

POINT V.

The Evidence Does Not Support the Holding by the Tax Court That the Dominant Motive of the Decedent in Making the Agreement of December 2, 1942, Was to Escape Estate Taxes. On the Contrary, the Evidence Shows That the Decedent, Who Was Contemplating Retirement, Acted on the Advice of Counsel to Give His Wife the Legal Title to the One-half of the Property Which She Owned, as Had Always Been Their Intention to Own the Property, and to Assure a Division of Income for Income Tax Purposes and to Avoid a Possible Gift Tax Which He Had Been Advised Would Be Effective if He Executed the Agreement After January 1, 1943.

The weight of the evidence not only fails to sustain the findings of The Tax Court that decedent made the agreement of December 2, 1942, for the sole and only purpose of escaping estate taxes, but on the contrary it establishes that decedent entered into the agreement for the purpose of creating presently separate legal estates of the property owned by himself and his surviving spouse as they had always understood and intended that the property was owned. A secondary motive was to make sure upon the retirement of decedent that there would remain a division of income, because at the time there was considerable apprehension abong taxpayers in community property states that Congress would deprive them of the privilege of splitting the income by the spouses for income tax purposes. Thirdly, the decedent beyond question, and as found by the court, made the agreement prior to January 1, 1943, for the purpose of avoiding gift tax he had been advised would be imposed by the amendments to the Code.

Far from there being a dominant motive on the part of the decedent to escape estate tax, the facts more clearly tend to show that there was an utter lack of any motive of any kind on the part of the decedent for any purpose in making the change in the form of property holding, let alone the single idea of escape of estate taxes. A want of motive was held to defeat the statute in the case of *Annie T. Stinchfield,* Memo. Op. T. C., Docket No. 2807, May 10, 1945; reversed and remanded on other grounds, *Commissioner v. Estate of Stinchfield* (C. C. A. 9, 1947), 161 F. 2d 555.

In that case decedent had acted entirely upon advice of counsel, and the gifts made were held for that reason not to have been made in contemplation of death, the reasoning being that there was lack of motive to do anything in contemplation of death. The same underlying thought was, oddly enough, stated by Disney, judge, who wrote the majority opinion in the instant case for The Tax Court in the case of *Fletcher E. Awrey* (1945), 5 T. C. 222.

If ever a man acted entirely upon advice and insistence of action by his counsel, certainly the decedent in this case did. The agreement of December 2, 1942, was entirely the outcome of insistent urging of decedent's friend and insurance advisor, one Walter W. Jones [R. 107, 112, 122, 126, 129].

The decedent had decided to retire July 1, 1943, and had discussed his retirement with his friend Jones. Jones ascertained during the discussions that decedent held his property in joint tenancy with his wife. Decedent thought he and his wife owned their property separately in equal division. Jones was not sure whether decedent owned his property in joint tenancy or in community, but knew that decedent wanted and thought they had separate ownership. Jones wished to sell two policies of insurance upon the lives of decedent and his wife. He insisted that decedent change his property holding to that of tenancy in common so as to create the separate ownership the parties wanted and thought they had.

The record shows that the discussions between decedent and Jones relative to his retirement and the nature of the property holdings of the decedent commenced in the summer of 1942 and continued through the fall until the execution of the agreement on December 2, 1942 [R. 108].

When the discussions commenced, and until October 21, 1942, when the Revenue Act of 1942 was passed, an agreement made between husband and wife declaring that their property held as community property would henceforth be held by them as tenants in common did not constitute a transfer made in contemplation of death if one of the parties died. Sec. 811(c) of the Internal Revenue Code was never invoked to include such a transfer, if one there be under such circumstances.

Jones, who was in the insurance business and kept informed to some extent of changes in the tax law relative to estates as a part of his business, understood this situation. It therefore occurred to him, as the record plainly shows, that if decedent and his wife entered into an agreement declaring that their property held by them in joint tenancy was in fact owned by them as community property and that henceforth it would be owned by them as tenants in common, such an agreement would clearly not be within the purview of the statute.

However, during the fall of 1942 Jones became apprised of the fact that Congress was contemplating passing the

Revenue Act of 1942 and amending the Code relative to the estate and gift tax provisions to encompass community-held property [R. 104, 127, 212 and 213]. But, as he testified, his service was slow in reaching him. He did know that the Revenue Act of 1942 had been passed, but was not informed as to its effective date. On November 11, 1942, Jones wrote to his tax counsel, one Toll, in Los Angeles outlining the plan of the agreement which he proposed that the Rickenbergs execute, and inquired as to the legal effect of his proposal in view of the changes made to the Internal Revenue Code by the Revenue Act of October 21, 1942. Jones received a reply to his letter from said Toll stating in part:

> "The division of community property between husband and wife, thus destroying its community character, seems to me a very desirable step in view of the estate tax changes affecting community property which will take place on January 1, 1943."

Jones' letter to Toll was dated November 11, 1942 [R. 212, 213] and Toll's letter to Jones was dated November 13, 1942 [R. 213, 215]. Toll's letter went on further to advise Jones that:

> "Furthermore, as to new community property, it seems quite clear to me that no gift tax is involved upon a division thereof which takes place prior to January 1, 1943, although possibly any division which takes place after that date will be subject to gift tax."

Acting upon this advice, that no estate tax would be due by decedent until after January 1, 1943, if a division of his community-held property with his wife was effected prior to January 1, 1943, and, further, that a gift tax would be imposed if the agreement as contemplated was entered into after January 1, 1943, Jones prevailed upon decedent to execute the agreement prior to January 1, 1943, and wrote him a letter on November 28, 1942, suggesting that this be done [R. 208, 209]. Jones then accompanied decedent to decedent's attorney, one A. L. Hickson of Pomona, California, and told Attorney Hickson the type of agreement that was desired and the purposes for which it was being done.

What we are seeking to determine in this inquiry is the state of mind of the decedent on December 2, 1942, when he executed the agreement in question. The Tax Court holds that the dominant motive causing him to execute the agreement was to avoid estate tax because he held his property as community property, all of which would be included in his gross estate at his death.

Decedent, as The Tax Court found, "was following the advice of Jones, the insurance agent," and had been informed by Jones that if the agreement in question were executed before January 1, 1943, no tax liability would occur either as to estate taxes or as to gift taxes. This was the advice of Jones' tax counsel Toll. It follows *a fortiori* that decedent could not possibly have intended to escape estate taxes even if there is attributed to him every intent and cerebration of Jones.

Jones did not think that the agreement would cause an avoidance of estate tax if the decedent owned his property as community property. The court found that he did so own it. There was no estate tax to be avoided on December 2, 1942, so far as Jones knew. He had been erroneously informed by his tax counsel that the changes in the estate tax law would not become effective until January 1, 1943.

This explains why Jones on the witness stand so steadfastly adhered to his testimony that the agreement was not made to avoid estate tax, but to avoid gift tax.

Where no tax is imposed upon a transfer of property by a decedent under the law, and the law is changed to tax such a transfer, and decedent is prevailed upon to make such a transfer upon the erorneous advice of counsel that the change in the law will not become effective until a future time, by what process of reasoning can it be held that decedent made the transfer to avoid present existing tax? The answer is obvious. He did not.

The holding of The Tax Court has been clearly demonstrated to be without any evidence to support it, let alone substantial evidence. The holding is nothing but an inference, and as such cannot support the second inference that a transfer was made by the decedent in contemplation of death. *Estate of Cronin v. Commissioner* (C. C. A. 6, 1947), 164 F. 2d 561.

Even though the purported transfers in question occurred after the effective date of the amendments to the Code, October 21, 1942, yet because of the fact that decedent acted without knowledge that the law had been changed and was in effect on December 2, 1942, and could not possibly have had an intent to escape estate taxes, the situation is analogous to the early decisions of the Supreme Court, which refused to apply the estate and gift tax statutes retroactively. In the case of *Shwab v. Doyle* (1922), 258 U. S. 529, 66 L. Ed. 747, the court refused to apply the provisions of the first Estate Tax Act of 1916 retroactively to include a transfer of property determined by the trial court to have been made in contemplation of death. The Gift Tax Act of 1924 was likewise decided by the Supreme Court in *Untermeyer v. Anderson*

(1928), 276 U. S. 440, 72 L. Ed. 645, not to be applicable to gifts made prior to its passage. Likewise, in *Nichols v. Coolidge* (1927), 274 U. S. 531, 71 L. Ed. 1181, the retroactive provisions of the Revenue Act of 1918 were held not to be applicable to include in the gross estate a gift *inter vivos* not made in contemplation of death, but long before the adoption of legislation imposing an estate tax on gifts *inter vivos* to take effect in possession or enjoyment at or after death because the tax burden could not have been foreseen or understood when the gifts were made.

Indeed, it would be an odd travesty upon justice to allow taxing acts to impose taxes retroactively upon transactions which took place many years before the enactment of legislation upon the subject. This thought is best expressed by the Supreme Court's own statement in the case of *Milliken et al. v. United States* (1931), 283 U. S. 15, 51 S. Ct. 324, 75 L. Ed. 809, 51 "Supreme Court Reporter" 324, where it said at page 326 thereof:

> "This court has held the taxation of gifts made, and completely vested beyond recall, before the passage of any statute taxing them, to be so palpably arbitrary and unreasonable as to infringe the due process clause."

In the *Milliken* case the gift, when made, was subject to the 1916 Revenue Act. The court said that the decedent was warned that his gift might be taxed as it would be if he on that day made the same disposition of it by will. In the instant case, as previously pointed out, had the gifts in question been made by the decedent at any time prior to October 21, 1942, the date of the enactment of the Revenue Act of 1942, the gift would not have been taxable under any provision of any act. That was the very reason why the act was passed.

Not only does the testimony of decedent's friend, Walter W. Jones, establish that the decedent executed the agreement in question without intent to evade estate taxes, but respondent's own evidence introduced at the hearing in the form of correspondence between the said Jones and his tax counsel, Toll, particularly Toll's letter of November 13, 1942, conclusively proves beyond the shadow of a doubt that the decedent could not possibly have had an intent to avoid estate taxes. It therefore follows that respondent's determination was erroneous and that the holding of The Tax Court affirming respondent's determination, being predicated upon the sole narrow ground that decedent executed the agreement in question with the intent to avoid estate taxes, which is refuted by respondent's own evidence and is without a scintilla of evidence to support it, is erroneous.

Petitioner has proved that the motive upon which The Tax Court predicated its decision just did not exist. Having done so, petitioner can well rest her case.

Perhaps, however, a discussion of the evidence showing why decedent executed the agreement may help to clarify the issue.

A. Decedent and His Surviving Spouse Made the Agreement of December 2, 1942, to Separate Ownership of Half of Their Property in Each as They Had Always Intended to Own the Property.

Jones testified that decedent told him that he and his wife owned their property in joint tenancy; "that we both own fifty-fifty"; "we have made everything we made together"; "we own it together; it is share and share alike." [R. 108.]

When Jones informed him that if he owned it in joint tenancy the Federal Government would include it all in his estate upon his death, he said: "That isn't the way our property is." [R. 108.]

The testimony of Mrs. Rickenberg shows the intention of the spouses to own their property separately [R. 139, 140]. Corroboration is furnished by the testimony of Attorney Hickson [R. 161, 162]. The purposes expressed in the agreement itself fully establish their earlier intention of amnesty [R. 204].

The evidence thus establishes that one of the purposes of the agreement was to create the legal separate estates for the decedent and his wife of equal shares of their property, as had been their understanding and intention to own their property throughout the marital period, and which they had mistakenly thought they had accomplished by holding their property in joint tenancy. The impelling cause of the agreement was to correct an error that had been made by them, and in no way was the thought of death the impelling cause.

> *City Bank Farmers Trust Company v. McGowan* (1945), 323 U. S. 594, 65 S. Ct. 496, 89 L. Ed. 483.

The decedent, as found by The Tax Court, was in normal health and was obviously contemplating the enjoyment of the fruits of his property acquisitions upon his retirement from the J. C. Penney Co., and every bit of evidence in the record demonstrates that his action was dominated by motives associated with life.

B. A Second Equally Important Reason for the Agreement, as Is Fully Established by the Evidence, Is That the Decedent Wished to Make Certain That He and His Wife Would Continue to Enjoy the Benefits of the Division of Income for Federal Tax Purposes Which the Community Property States Enjoyed.

The testimony of Mr. Jones and Attorney Hickson enumerates that as one of the reasons for the agreement. The testimony was to the effect that at the period of time at which this agreement was made there had existed some well-founded apprehension among the citizens of the community property states, and especially in California, that the federal income tax laws might be amended to eliminate the advantage of the division of income for tax purposes enjoyed by those citizens. The enactment of the sections of the Revenue Act of 1942 that have brought about this litigation gives ample justification for the fears. This was one of the arguments used by Mr. Jones in convincing the decedent that he should execute the agreement. The evidence is clear and uncontroverted on this point, and it establishes that it was one of the impelling motives causing the decedent to execute the agreement.

There is ample authority that a motive to escape income taxes is one which takes an agreement out of the ban of the statute.

Estate of Julius Bloch-Zulzberger, Memo. Op., T. C. Docket No. 10216, Nov. 12, 1947, C. C. H. Decision 16129(M);

Estate of L. Bendet, Memo. Op., T. C., Docket No. 7188, April 25, 1946;

Becker v. St. Louis Union Trust Company (1935), 296 U. S. 48, 56 S. Ct. 78, 80 L. Ed. 35.

C. The Third Impelling Motive of the Decedent in Executing the Agreement of December 2, 1942, Was to Save Gift Taxes Which He Had Been Advised Would Be Imposed if He Executed the Agreement After January 1, 1943.

The said Walter W. Jones testified vehemently and repeatly under heavy cross-examination by counsel for respondent that the reason for the execution of the agreement was to avoid the gift tax amendments to the Code which were to become effective on January 1, 1943. Section 451 of the Revenue Act of 1942 so provided with respect to the amendment made to Section 1000 of the Internal Revenue Code by Section 453 of the Revenue Act of 1942, adding thereto a new subsection "(d) Community Property." This new subsection provided that all gifts of property held as community property shall be considered to be the gifts of the husband, with certain provisos. The purpose and intent of that amendment was to tax gifts of community property to the husband; whereas, prior to January 1, 1943, gifts of community property were taxable half to the husband and half to the wife. By the amendment it is obvious that the gift tax in the community property states was in most cases increased materially.

Decedent having been advised by said Walter W. Jones that it was to his best interests to divide the property which the parties thought was held as community property by the decedent and his surviving spouse, decedent decided to execute the agreement, declaring that henceforth his property would be held in the estate of tenants in common with his surviving spouse. The advice received by decedent from the tax counsel Toll through Walter W. Jones was to the effect that the execution of such an agreement, if made after January 1, 1943, would be subject to the new gift tax amendments to the Code. This was sufficient to cause the decedent to act before the effective date of the amendments, and The Tax Court found that the decedent so acted to execute the agreement prior to January 1, 1943.

That saving of gift tax was the dominant thing in the mind of the decedent is thus firmly established by the evidence. This has been decided in numerous cases by The Tax Court to be sufficient reason for taking a transfer out of the ban of Section 811(c) of the Internal Revenue Code under question. See

Estate of Fletcher E. Awrey, supra;

Anna Ball Kneeland, Execx. (Will of Yale Kneeland) (1936), 34 B. T. A. 816;

Estate of John H. Scheide, Memo. Op., T. C., Docket No. 2235, December 3, 1947, where a transfer to save income tax and avoid anticipated increase in gift tax was held not in contemplation of death.

See, also:

Boyle Trust & Investment Co., Exec. (Estate of C. H. Boyle), v. United States (D. C. Tenn., January 4, 1943), 32 A. T. T. R. 1624;

M. L. Fair, Execx. (Estate of M. L. Lorch), v. United States (D. C. Pa., 1945), 59 Fed. Supp. 801;

Estate of A. F. Howell, Memo. Op., T. C., Docket No. 10840, January 28, 1943; appealed C. C. A. 3; dismissed and affirmed October 19, 1943, without written opinion; 1943 P. H. par. 61,114.

Yet in the instant case The Tax Court stated:

> "The idea that the object was escape of gift tax is rendered almost absurd by the fact that if no transfer had been made no gift tax would have been incurred."

Such a statement is, at most, trite. Obviously no gift tax would ever be incurred if a person never made a gift, but every taxpayer has a right to make a gift, and if the decision to make the gift is formulated at such a time that a gift tax would be avoided, whereas, if delayed, a gift tax would be imposed, it may well be, as it was in this case, that the motivating factor which finally caused the decedent to make the gift and was dominant in his mind, was the saving of the gift tax which would result from delay on his part.

This thought is well expressed in the *Estate of Cronin v. Commissioner, supra,* where the court said:

> "Even so, it is an aspect of human nature that may not be ignored, that the fear of events that impend and seem imminent, overrides apprehension of a contingency that however certain seems remote."

Since the decedent had been advised and urged by Jones to execute the agreement in question, and that he would possibly incur a gift tax if he did so after January 1, 1943, the decedent obviously was in fear of the imminent event of the impending gift tax rather than apprehending the certain contingency which, so far as the evidence shows, seemed remote.

This thought is agreed with by Johnson, judge, in his dissenting opinion. Judge Johnson refers to the fact that decedent's lawyer had advised him that after January 1, 1943, a transfer to his wife would be taxable. From this he concludes that the facts indicate that the transfer was made in contemplation of a change in the gift tax law as applied to community property rather than in contemplation of death. Having previously demonstrated that respondent's own evidence proves that the decedent could not have intended to avoid estate taxes because of the advice given him by the lawyer, the correctness of Judge Johnson's conclusion cannot be denied.

Finally, Judge Johnson correctly points out in his dissenting opinion that the decedent did not have to maintain his *status quo* of holding his property as community property, and that he was conscious of the tax consequences of his act and, being conscious, chose an advantageous form of tenure in making the transfer. In short, Judge Johnson follows the well-established rule of law that a taxpayer may take any legal course of action which will cause him to pay the least tax. He does not have to take the course which will cause him, or, as in this case, his estate to pay the greater tax. *United States v. Isham,* 84 U. S. (17 Wall.) 496, 21 L. Ed. 728, and *Gregory v. Helvering* (1935), 293 U. S. 465, 79 L. Ed. 596, 55 S. Ct. 266.

This rule of law is made even stronger by the fact that the decedent was not conscious of the tax consequence of his act. He was erroneously advised that there would be no tax consequences of his act as to estate tax if taken prior to January 1, 1943.

The majority opinion cites as one of the reasons why decedent could not have executed the agreement to avoid gift taxes that Jones, prior to October 30, 1942, when he first wrote to decedent, had not learned of the change in gift tax, "so that the contention that gift tax saving was in mind is without foundation." The thought being that all the discussions during the summer and fall of 1942 could not have contemplated in any way gift tax saving. That is true. But it is equally true that their discussions could not have contemplated estate tax saving for precisely the same reasons.

At that time no estate tax would have been imposed upon the whole estate of a division of property held as community. Therefore, it was physically impossible for decedent to have contemplated saving or escaping estate taxes.

Since The Tax Court found that Jones did not have knowledge of the change in the gift tax law at that time, and since the change occurred in the same statute that changed the estate tax law to affect property held as community property, The Tax Court's own findings of fact and opinion prove that Jones and decedent did not have knowledge of the change in the estate tax law and therefore could not have acted to save or escape estate taxes. So far as they knew, there were none to escape or save, but there was a danger of having to pay a gift tax if action was delayed.

Contemplating the changes in the estate tax law which took place in the Revenue Act of 1942 and comparing them with the changes in the gift tax law contained in the same act, both affecting community property, it appears conclusive that Congress contemplated the very situation which is presented in this case; that is, Congress must have been apprised of the fact that innumerable citizens in the community property states holding their property as community property would be caught by the changes made by the Act to the Revenue Code affecting the inclusion in the gross estate of the decedent of the full value of the property held as community property. To suddenly impose upon a segment of the population a tax to which in the scheme of events, it had never been subject before would be unfair; and therefore it must have been that Congress intended to allow citizens of the community property states to rearrange their community property holdings if they saw fit without incurring any tax liability. Therefore the gap was allowed between the passage of the Act on October 21, 1942, and the effective date of the gift tax provisions on divisions of community-held property on January 1, 1943. In short, Congress itself seems to have deemed that avoidance of estate tax was in no wise reprehensible, and certainly that gifts made between husband and wife in the community property states for the express purpose of avoiding estate tax would not be made in contemplation of death. There is no other logical explanation for the difference in effective dates between the two provisions of the Act.

POINT VI.

A Primary and Dominant Purpose to Escape Estate Taxes Is Not Alone Sufficient to Constitute a Transfer by a Decedent of an Interest in Property as Made in Contemplation of, or Intended to Take Effect in Possession or Enjoyment at or After, His Death Within the Meaning of Section 811(c) of the Internal Revenue Code.

Having demonstrated hereinbefore that, as a matter of law, Sec. 811(c) of the Internal Revenue Code is not applicable to the agreement by the decedent and his surviving spouse executed on December 2, 1942, here involved and that the evidence does not sustain the holding by The Tax Court, we will now proceed to prove that, assuming all factors in the case in favor of the Government, the agreement in question was not within the purview of Sec. 811(c) of the Internal Revenue Code.

We will assume the Government's position and contention that the agreement of December 2, 1942, resulted in cross-transfers of interests in property held by decedent and his wife as community property; that is, that decedent transferred to his wife his one-half interest in the property so held, and that she transferred to him her half interest in the community property. We will assume the inference to be the fact that decedent executed said agreement and made said transfer for the primary and dominant purpose of escaping estate taxes. We will prove, however, as a matter of law, that a motive to avoid or reduce estate tax is not such a consequence alone which will cause the transfer to be in contemplation of death. The Tax Court stated in the majority opinion:

> "* * * we examine only, in this respect, the question as to whether there was such motive and intent to escape estate taxes as to bring the transfer within the ban of the statute. * * * The petitioner contends, however, that there is no evidence to establish that the decedent's dominant motive was to escape estate taxes. The question is one of fact."

The Tax Court correctly stated that it was a question of fact as to whether the inference results that decedent intended to escape estate taxes. Although we have shown that the evidence fails to support the finding that such was the dominant motive of decedent, we are assuming for purposes of this argument that The Tax Court's finding was correct. However, The Tax Court then inferred that because decedent's purpose was to escape estate taxes by the agreement in question, it followed as a matter of law that the assumed transfer was made in contemplation of death within the meaning of the statute.

That a primary and dominant motive to escape estate tax is not alone sufficient to bring a gift within the meaning of the expression "made in contemplation of death" as used in the statute, has been established by the Supreme Court itself. In the case of *Allen v. Trust Company of Georgia* (1946), 326 U. S. 630, 90 L. Ed. 367, the Government contended, as it does in this case, that the gift was made for the sole and only purpose of avoiding estate taxes. The District Court found that the gift was not made in contemplation of death. The Circuit Court of Appeals for the Fifth Circuit affirmed. The Government sought and was granted certiorari. The sole argument made and contention presented by the Government was that the transfer consisting of the release of the power of amendment was made for the purpose of avoiding estate tax and, therefore, was made in contemplation of death. The Supreme Court refused to disturb the holdings of the lower court even though the release of the power which constituted the gift was done for no other purpose than to eliminate from his gross estate the trust which the donor had created prior and in which the power of amendment had been reserved by him.

Under the federal estate tax law then in effect, had the decedent Spalding not released the power of amendment prior to his death, the trust created by him for the benefit of his children would have been included in his gross estate. He was a lawyer and knew and understood this to be the law, and had been so advised by other lawyers. He could have had no other dominant motive in mind in making the release of the power to amend the trust except to avoid the estate taxes thereon.

The net result of the decision is that an intent to escape tax is not, *per se*, contemplation of death within the meaning of Sec. 811(c) of the Internal Revenue Code. There must be other facts found which, when weighed with a motive to escape estate tax, constitute "contemplation of death."

Once before The Tax Court tried to invoke the doctrine that avoidance of estate tax is, *per se*, contemplation of death within the meaning of the statute where an *inter vivos* transfer of property had been made by decedent. When it was the Board of Tax Appeals, it decided the case of the *Estate of Denniston* (1939), 38 B. T. A. 1076; reversed *Denniston, Exec., et al., v. Commissioner* (C. C.

A. 3, 1939), 106 F. 2d 925. In that case the subject matter of the gifts was a relinquishment in 1932 of a power of appointment retained by the decedent Denniston in a trust she had made in 1915 in favor of her children and outright gifts of two pieces of real property conveyed by deeds to her daughter. As in the instant case, the decedent Denniston was in good health, as found by the Board, although much older, 74 years of age at the date of the gifts. She also had been advised by her attorneys that the corpus of the trust would be included in her gross estate for federal estate tax purposes if she did not relinquish the power of appointment, and that a gift tax was being contemplated by Congress, and was passed in that year, which would have imposed a tax upon the gifts if she delayed in making the gifts until after the law was enacted and became effective. These facts parallel the facts in the instant case.

The Board of Tax Appeals, just as in the instant case, predicated its holding solely on the ground that the decedent Denniston sought to avoid estate taxes, and therefore affirmed the determination of the Commissioner that the gifts were made in contemplation of death within the meaning of the statute.

On the appeal in the case of *Denniston, Executor, et al. v. Commissioner, supra,* the Circuit Court of Appeals for the Third Circuit viewed the matter differently, and said:

> "There was as the Board points out, substantial evidence to support the finding that the decedent was motivated by the desire to avoid estate taxes and we

> must accept it. * * * The question remains, however, whether the fact that a transfer was made to avoid estate tax is, without any other evidence of a motive associated with death, sufficient to support an ultimate finding or conclusion that the transfer was made 'in contemplation of death' within the meaning of Sec. 302 of the Revenue Act."

The court then answered the question in the following language:

> "We think that because in carrying out a plan to provide for her children the donor uses a method which she thinks is best calculated to save death taxes the conveyance is not thereby conclusively stamped as 'contemplation of death.' The desire to avoid estate taxes may be just as clearly present in the mind of a young and vigorous donor who thinks of death as far distant as in that of one who is old and feeble and who looks momentarily for its coming. Standing alone, it cannot be deemed conclusive of a mental state such as is contemplated by the statutory phrase 'contemplation of death.'"

The Tax Court has deliberately ignored or failed to understand the doctrines laid down by the Supreme Court that a single factor cannot constitute a gift *inter vivos* as made "in contemplation of death" within the meaning of that phrase as used in Sec. 811(c) of the Internal Revenue Code. *Colorado National Bank v. Commissioner* (1938), 305 U. S. 23, 27.

The holding in *Commonwealth Trust Company of Pittsburgh v. Driscoll* (1943), 137 F. 2d 653, cert. den. (1944) 321 U. S. 764, relied on primarily by The Tax Court, is not in conflict with the *Denniston* and *Trust Company of Georgia* cases. There were other factors involved which justified the *per curiam* affirmance of the District Court decision. It is not authority for the proposition that a motive to escape estate tax is alone sufficient to constitute a transfer as made in contemplation of death.

In that case the decedent was 80½ years of age on the date of transfers. The circumstances surrounding the transfers showed thoughts of death. But the thing which made the District Court's decision correct, completely, aside from contemplation of death, was the fact that the transfers were to take effect in enjoyment and possession at or after the donor's death. He still retained possession and enjoyment of the property until five years after the gift. It was his death which brought about the completed gift. There thus existed no reason for the Circuit Court of Appeals to reverse the District Court, so it merely affirmed the judgment without opinion.

Further, it must be carefully borne in mind that the same Circuit Court of Appeals affirmed the *Commonwealth Trust Company of Pittsburgh* decision that decided the *Estate of Denniston v. Commissioner* case, *supra*. Nor is it of any significance that the Supreme Court denied certiorari. Correctness of the decision was sufficient reason.

In the same way the other three cases cited as authority by the majority opinion are easily distinguishable. They all involved gifts of property to take effect in possession or enjoyment at or after the death of the donor.

Thus for any reason it was includible in the gross estate of the donor upon his death. In all the cases there were additional factors which, in addition to establishing contemplation of death, required the inclusion of the property in the gross estate. *Commissioner v. Estate of Church* (January 17, 1949), 1949 P. H. par. 72,004.

It therefore follows that The Tax Court has failed to follow the applicable decisions of the Supreme Court and the Circuit Courts of Appeals in deciding the instant case. The decision of The Tax Court must be reversed.

And now, finally, The Tax Court has completely demonstrated its lack of coordination and its utter inconsistency in its decisions. On January 5, 1949, an opinion was promulgated in the case of the *Estate of Charles J. Rosebault, Laura D. Rosebault, Executrix* (January 5, 1949), 12 T. C. No. 1, wherein The Tax Court arrived at an exactly opposite decision from its decision in the instant case.

It is significant that not one of the members of The Tax Court constituting the majority in the opinion in the instant case even raised his voice in protest against Judge Hill's opinion in the *Rosebault* case. Judge Hill had the courage of his convictions to dissent from the majority opinion in the instant case, and on the very same ground upon which he predicated his opinion in the *Rosebault* case. The net result is that we have The Tax Court within a year's time deciding the precise point oppositely. Their last decision was in accordance with the decided cases of the *Estate of Denniston v. Commissioner, supra,* and *Allen v. Trust Company of Georgia, supra;* whereas, their decision in the instant case is, as before stated, in direct conflict with these decisions.

POINT VII.

If Under the Agreement of December 2, 1942, Decedent Transferred His Interest in the Property Owned by Him Prior Thereto, Then:

A. A Bona Fide Sale for an Adequate and Full Consideration in Money or Money's Worth Took Place Within the Meaning of the Exception Provided in Sec. 811(c) of the Internal Revenue Code, and Petitioner Reported at Least the Value of Decedent's Interest in Property at the Time of His Death; or:

B. If Said Transfer was not a Bona Fide Sale for an Adequate and Full Consideration in Money or Money's Worth, Then There Did Not Exist Any Excess of the Fair Market Value at the Time of Decedent's Death of the Property Transferred by Him on Account of Such Transaction Over the Value of the Consideration Received Therefor by the Decedent as Provided Under Sec. 811(i) of the Internal Revenue Code.

A. The Transaction Was a Bona Fide Sale for an Adequate and Full Consideration in Money or Money's Worth.

Petitioner has strongly contended that if transfers of property be deemed to have occurred by the agreement of December 2, 1942, as assumed by the respondent in his determination and further assumed by The Tax Court in its decision in the instant case, the transaction falls within the exception provided in Sec. 811(c) as a *bona fide* sale for a full and adequate consideration in money or money's worth. The essence of the consideration obviously is the receipt of money or of property which is readily reducible to money or money's worth.

The majority opinion below holds that the agreement does not come within the exception provided in Sec. 811(c) for three reasons:

First, no sale.

Second, under Sec. 812(b)(5) of the Internal Revenue Code, relinquishment of marital rights in the decedent's property shall not be considered to any extent a consideration in money or money's worth.

Third, that there was a lack of consideration because the exchange of property did not bring into decedent's estate the equivalent therefor.

The absurdity of the majority opinion in the second holding above referred to is so patent as to hardly merit passing observance. As pointed out in the dissenting opinion of Judge Hill, the majority completely misunderstood that the surviving spouse was not relinquishing marital rights in decedent's property in exchange for his transfer to her of his half of the community property. Petitioner does not now and never has contended that the surviving spouse had any marital rights in the property of the decedent or that, if such existed, she did in any way transfer them to decedent by the agreement of December 2, 1942. It is fundamental, of course, that the wife owns absolutely one-half of the community-held property. The minority opinion of Judge Hill very nicely sets forth the property rights and interests of the community relationship, and points out the error in the holding of The Tax Court in this regard, and needs merit no further comment.

As to the third reason for their holding in this issue, that there was no consideration because the estate of the decedent was not left intact by that which it received in exchange for that which was transferred, is so absurd as to be utterly ridiculous. The majority opinion went off on a tangent after stating:

> "In short, the intent of the exception stated in section 811(c) is that if the transfer of property from a decedent brought into his estate the equivalent thereof, the estate, of course, was not diminished. * * * The petitioner's estate here, had there been no transfer of December 2, 1942, would have included the community property. It would have included the property even though it was regarded as joint estate. After that transfer, decedent's estate, except for the application of Sec. 811(c) consisted of one-half of the property transferred. The diminution of the estate, and the lack of the necessary consideration in money or money's worth cannot be doubted."

The error in The Tax Court's reasoning is patent. First it assumes that the decedent owned all the property prior to December 2, 1942, although it had held that the property was held as community property. It could not be both. If held as community property, the decedent only owned one-half of the property. Even if held jointly, he only owned one-half of the property. There never was, by any theory, a diminution of his estate. The Government's theory of the case, which the majority opinion of The Tax Court, in the above-quoted language, has completely lost sight of, is that the decedent and his wife owned their property in community, that he owned one-half of the property, and that she owned one-half of the property, that the transfer by him on December 2, 1942, was for tax purposes of no effect, and that, therefore, the half of the property which he received from her and held as tenant in common at the date of his death, plus the half of the property which he transferred to her on December 2, 1942, which transfer was ineffectual for estate tax purposes, was the measure of his gross estate, and that he was, therefore, taxable on the whole. The Government's theory is no such thing as set forth by the majority opinion of The Tax Court, although the ultimate effect in dollars and cents in tax results. The error in reasoning vitiates The Tax Court's holding that there was not adequte and full consideration in money or money's worth in the exchange. It is so obvious that the exchange of properties of like value is adequate and full consideration in money or money's worth that the holding of The Tax Court that there was not adequate and full consideration in money or money's worth is amazing in a body that has dealt with tax cases for as long a period of time as that administrative agency has. It has been agreed that the value of the property transferred was $124,560.94. The value of the property received had to be $124,560.94, since it was a division of community property. If $124,560.94 exchanged for $124,560.94 is not adequate and full consideration in money or money's worth, then words have no meaning.

As to the majority opinion's first holding on this issue, that there was no sale, it likewise is error. There is authority that a transmutation of property such as occurred here constitutes a sale. *Ferguson v. Dickson* (C. C. A. 3, 1924), 300 F. 2d 961, cert. den. 266 U. S. 628. *Black's Law Dictionary* in its definition of a sale, points out that the distinction between a sale and an exchange of property is one rather of shadow than of substance. Also, in *Sec. 93, "Hughes Federal Death Tax,"* it is stated:

> "The word 'sale' as used in this section of the law should not receive too strict a construction and must be considered to embrace an exchange."

All the legal elements necessary to constitute a sale clearly exist in this case.

Since the decision below, The Tax Court has decided the question of consideration exactly opposite in a gift tax case. The case of *Norman Taurog* (1948), 11 T. C. No. 120, involved a division of community property in California between a husband and wife who were contemplating divorce, and which division was to be imposed in the divorce decree and also, in fact, made a part of such decree. This was done at a time when the provisions of Sec. 453 of the Revenue Act of 1942 were in effect, which amended Sec. 1000 of the Code by adding a new subparagraph (d) thereto, which provided that "all gifts of property held as community property under the laws of any state * * * should be considered to be the gifts of the husband * * *."

The decision of The Tax Court in the *Taurog* case was vehemently dissented to by the writer of the majority opinion in the instant case, Judge Disney. He pointed out that there is an utter inconsistency in the holding in that case and the holding in the instant case, and that the division of property in the *Taurog* case does not constitute consideration, excepting the transfer as a gift. Both the estate tax provisions of the Code and the gift tax provisions of the Code provide almost identical wording for transfers of property for less than an adequate and full consideration in money or money's worth.

Judge Disney's dissenting opinion is predicated on the doctrine announced by the Supreme Court in *Estate of Sanford v. Commissioner* (1939), 308 U. S. 39, that:

> "The gift tax was supplementary to the estate tax. The two are *in pari materiae* and must be construed together."

Thus the two sections of the Code must be read together to get their meaning, and certainly if in the *Taurog* case a division of community property constituted a full and adequate consideration in money or money's worth, the division of community property in the instant case must, *a fortiori,* also constitute adequate and full consideration in money or money's worth; hence the two decisions by The Tax Court, as pointed out by Judge Disney, are totally inconsistent and in conflict with each other.

But for reasons which will be demonstrated under "B," the decision in the *Taurog* case is correct and the decision by The Tax Court in the instant case is incorrect.

B. The Transaction Was a Transfer for a Consideration in Money or Money's Worth, and the Fair Market Value of the Property Transferred at the Date of Death Did Not Exceed the Value of the Consideration Received by the Decedent.

Even if it be assumed that there were transfers of interest in property effected by the agreement of December 2, 1942, between decedent and his surviving spouse, as is the position of the Government, then there still would be no deficiency in respect of the estate tax liability. Petitioner included in the gross estate, in computing the estate tax liability of the estate of the decedent, at least the full value of the interest of one-half of the property held in tenancy in common; in fact there was reported an excess of the value. The respondent has contended that not only must there be included the value of the half interest owned by the decedent at the date of his death, but, also, because since the agreement constituted a transfer of his interest in the community property made in contemplation of death, that that interest must also be included in the gross estate, the net effect of which, of course, is to include in the gross estate for tax purposes the entire value of all the property.

Fortunately, however, Congress put two limitations upon the application of Sec. 811(c). It is obvious that it contemplated the possibilities of the very thing which took place in this case. It provided first an exception in Sec. 811(c) that any transfer of interest made in contemplation of death would be includible in the gross estate except when made for a *bona fide* sale for an adequate and full consideration in money or money's worth. The reason for that is obvious, and need not be discussed.

Then, however, Congress wisely realized that there would be many exchanges of property between parties, especially between members of families, in which a decedent might give property of a value in excess of that which he received in return therefor, and even though no sale was contemplated or took place in fact, yet there was an exchange of properties for a consideration. However, if the consideration was not adequate and full, Congress then provided that the excess of the fair market value at the date of death of the property transferred by decedent over that which he received should be included in his gross estate if made under conditions which brought the transfer within the purview of Sec. 811(c). This was all provided in Sec. 811(i) of the Internal Revenue Code, which placed rules of limitation upon the value of property to be included in the gross estate resulting from the transfers, trusts, rights, or powers enumerated and described in Subsections (c), (d), and (f) of Sec. 811 of the Internal Revenue Code.

The Tax Court, in holding that the agreement in question constituted a transfer by the decedent of an interest in property which was not a bona fide sale to his surviving spouse, and therefore not within the purview of the exception provided in Sec. 811(c), states:

> "The act does not include the word 'exchange', and that fact is significant."

Thus The Tax Court clearly infers that the transaction involved was an exchange of the properties. It could do nothing else under its theory of the case because, certainly, if transfers occurred the decedent received the interest in the property which his surviving spouse had and she received the interest in the property which he had. Therefore the transaction fell squarely within the provisions of Sec. 811(i), and for reasons fully discussed under "A" above, the exchange was, beyond the peradventure of a doubt, for a consideration in money or money's worth, the decedent receiving certainly as much in property value as he transferred, and the money or money's worth of the property has already been determined by the Commissioner in this case. Therefore there was no excess of the fair market value at the time of death of the property transferred by him on account of the transaction over the value of the consideration received therefor by the decedent.

The principles enunciated are so logical that they do not bear of question, and the Commissioner himself has utilized the same in making determinations involving transfers made in contemplation of death. *Schoenheit,* 14 B. T. A. 44, remanded *Schoenheit v. Lucas,* 44 F. 2d 476, only for determination of the value of the stock transferred. The Commissioner had included the difference between the price received for the stock of $63.74 per share and the value determined by him at the date of death of $149.00 per share in the gross estate of the decedent, because the transfer was made in contemplation of death. The Board of Tax Appeals affirmed the determination by the Commissioner of only including the excess of the value as required by Sec. 811(i), and the Circuit Court of Appeals agreed that such was correct, but was not satisfied with the value of $149.00 per share. Again, in the recent case of *Liebman v. Hassett* (C. C. A. 1, 1945), 148 F. 2d 247, the Circuit Court of Appeals affirmed the decision of the District Court that the value at date of death of the decedent of an insurance policy transferred in contemplation of death should be reduced by the amount of premiums paid by the transferee after the transfer. Thus only the excess of the value at date of death of the property transferred over that received was included, and the principle of Sec. 811(i) was followed.

In *Sec. 93, "Hughes Federal Death Tax,"* there appears the following:

> "If the property conveyed was of greater value than the consideration paid for it then only the excess is includible in the gross estate."

Thus, upon any approach to the case, and giving full weight to every contention that could possibly be advanced by the respondent, there remains the uncontroverted fact that under the applicable provisions of the Internal Revenue Code the petitioner reported at least the value of the interest which the decedent had in the property in question at the date of his death. This being so, and the respondent's determination not being in accordance with the law, and the re-determination of The Tax Court not following the applicable decisions and the law, it should be reversed.

Now that the offensive provisions of the Revenue Act of 1942 have been repealed as to the estate tax and are no longer in effect as to gift tax involving community property after April 2, 1948, the Bureau of Internal Revenue has issued a ruling in respect of the taxation of gifts upon a conversion of tenancy by the entirety to tenancy in common. The effect of this ruling is to recognize the principles of Sec. 811(i) and Sec. 1002 of the Internal Revenue Code. The ruling is designated "*Special Ruling,*" and was promulgated October 1, 1948, signed by D. S. Bliss, Acting Deputy Commissioner, published as *Paragraph 6028 of C. C. H. "Estate and Gift Tax Reports."*

What has taken place finally is simply this: That, belatedly, the Bureau has come to realize that it has got to give effect to Secs. 811(i) and 1002 of the Internal Revenue Code where parties owning equal interests in property partition or change their legal ownership of the same with each other. Under the provisions of the Code the mandate of Congress is perfectly clear, that only that part of the excess of the value of property exchanged, where a bona fide sale for an adequate and full consideration in money or money's worth does not exist, shall be subject to tax. As before pointed out, all transfers, whether for estate tax purposes or for gift tax purposes, are so limited by the provisions of Secs. 811(i) and 1002 of the Code.

In the *Taurog* case, *supra,* the decision of The Tax Court is sound for this very reason, although there does not appear to have been any evidence in the case as to the respective ages of the parties divorced. Even if Judge Disney should be correct in his dissenting opinion in that case, that the division of community property did not constitute an adequate and full consideration in money or money's worth, then the remaining provisions of Sec. 1002 are brought into play, and by the express terms of that section it is "provided that where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall for the purposes of the tax imposed by this chapter be deemed a gift, and shall be included in computing the amount of the gifts made during the calendar year."

Since in California the wife owns fully and completely one-half of the property, and a division of the property is made pursuant to a divorce decree or any other type of division, and if it be considered that a transfer from one to the other occurs, certainly the value of the property received by the husband has to be equal to the value of the property received by the wife, with only the nebulous exception of the difference in ages which is contemplated by the special ruling. Thus, if Taurog was older than his wife, instead of there being any taxable gift by him it was the reverse, because what he received was greater in value than that which he gave and Mrs. Taurog would then have been the donor.

This principle was pointed out by Judge Van Fossan of The Tax Court in the case of the *Estate of Lester L.*

Fletcher, supra, and which doctrine was likely the progenitor of the special ruling under discussion.

How there can be any differentiation between a conversion of property held in tenancy by the entirety into tenancy in common, of property held in joint tenancy into tenancy in common, and of property held as community property into tenancy in common, is not explainable. The ruling attempts to differentiate between conversions of joint tenancy in California from that of the conversions of tenancy by the entirety in Oregon by stating that in California either tenant may sever his interest at any time without the consent of the other. No explanation is attempted to show why that right creates any difference, but if a difference there be between those two, then by the Bureau's own reasoning conversion of property held as community property would fit squarely within the special ruling because neither party could at any time sever his interest in the community without the consent of the other.

In short, and in summation, even if a transfer occurred of decedent's property by the agreement of December 2, 1942, decedent received in exchange therefor at least the equal of that which he transferred in value, obviously money or money's worth, and hence under the provisions of Sec. 811(i) of the Code, there was no excess of value to be included in the gross estate for estate tax purposes. Therefore, the petitioner, having returned at least the value of the property owned by the decedent at the date of his death, there cannot result any deficiency in respect of the estate tax liability in this case.

POINT VIII.

Petitioner Overpaid the Estate Tax Liability of the Estate of the Decedent, and Is Entitled to a Refund.

The evidence is uncontroverted that petitioner reported on the estate tax return of the estate of the decedent a gross estate in excess of the value of the interest in property owned by decedent at the date of his death. There was inadvertently included in the gross estate 40 shares of guaranteed capital stock of Home Builders' Loan Association of Pomona, California, of the agreed value of $9,000.00. There was included in the gross estate all the cash on deposit at the First National Bank of Pomona, California, in the sum of $23,988.66. There was included in the gross estate all the United States Treasury "E" bonds and accrued interest of an agreed value of $6,397.13. There was included in the gross estate the agreed values of two automobiles in the respective amounts of $1,415.00 and $1,280.00.

Pursuant to the agreement of December 2, 1942, decedent's surviving spouse owned one-half of the property and decedent owned one-half. Therefore the gross estate was overstated by one-half of the agreed amounts. The mere fact that petitioner erroneously included the full value of these items in the estate tax return does not prevent a refund upon a determination of the correct tax liability of the estate.

Estate of Lester L. Fletcher, supra.

Further, petitioner has incurred additional expenses on behalf of the estate in the prosecution of this appeal. These included court costs, costs of printing the record, and briefs and attorney's fees, which were not determinate at the time the estate tax return was filed, and the tax paid.

Therefore, petitioner is entitled to a refund of estate tax paid over the amount owed, and for reasons set forth heretofore the decision of The Tax Court should be reversed and the case remanded, with instructions to The Tax Court to determine the amount of the refund due.

Conclusion.

It is respectfully submitted that the decision of The Tax Court cannot stand. As has hereinbefore been shown, its holding that the primary and dominant purpose of the decedent in making the agreement of December 2, 1942, was to escape estate taxes is not supported by an iota of evidence, and its conclusion, predicated on that erroneous inference, is likewise erroneous as not being in accord with the decided cases of the Supreme Court and the Circuit Court of Appeals and its own later decisions deciding the precise point oppositely.

Therefore, the decision of The Tax Court should be reversed, the petitioner awarded her costs, and the case remanded for determination of the amount of refund due the petitioner.

Respectfully submitted,

Charles J. Munz, Jr.,
Attorney for Petitioner.

APPENDIX.

The following are the applicable provisions of the Internal Revenue Code in effect during the period involved herein from October 21, 1942, through the calendar year 1944:

*   *   *   *   *   *   *   *   *

"Sec. 811. Gross Estate.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) Decedent's Interest.—To the extent of the interest therein of the decedent at the time of his death;

*   *   *   *   *   *   *   *   *

(c) Transfers in Contemplation of, or Taking Effect at Death.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;

(d) Revocable Transfers.—

* * * * * * * * *

(5) Transfers of Community Property in Contemplation of Death, etc.—For the purposes of this subsection and subsection (c), a transfer of property held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been made by the decedent, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse.

* * * * * * * * *

(i) Transfers for Insufficient Consideration.—If any one of the transfers, trusts, interests, rights, or powers, enumerated and described in subsections (c), (d), and (f) is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent."

The following are the related Gift tax provisions of the Internal Revenue Code in effect during the same period:

"SEC. 1000. IMPOSITION OF TAX.

(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift. * * *

* * * * * * * * *

(d) COMMUNITY PROPERTY.—All gifts of property held as community property under the law of any State, Territory, or possession of the United States, or any foreign country shall be considered to be the gifts of the husband except that gifts of such property as may be shown to have been received as compensation for personal services actually rendered by the wife or derived originally from such compensation or from separate property of the wife shall be considered to be gifts of the wife.

* * * * * * * * *

SEC. 1002. TRANSFER FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this chapter, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year."

"TREASURY REGULATIONS 105, SEC. 81.15. (As amended by T. D. 5239, Mar. 10, 1943.) Transfers during life.—* * *

In the case of estates of decedents dying after October 21, 1942, a transfer to a third party or third parties of property held as community property by the decedent and spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered, in accordance with section 811(d)(5), as added by section 402(a) of the Revenue Act of 1942, for the purposes of this section and sections 81.16 through 81.21, inclusive, to have been made by the decedent, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the spouse or derived originally from such compensation or from separate property of the spouse. The same statutory provisions apply in the case of a division of such community property between the decedent and spouse into separate property, and in the case of a transfer of any part of the community property into separate property of such spouse; in such cases, the value of the property which becomes the separate property of such spouse, with the exception stated in the preceding sentence, shall be included in the gross estate of the decedent under section 811(c) or section 811(d), if the other conditions of taxability under such sections exist. * * *

* * * * * * * * *"